

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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HELEN MOJTEHEDI,

Plaintiff(s),

v.

CHRISTIAN DURANTE d/b/a and a/k/a
DURANTE INSURANCE and FINANCIAL
SERVICES also d/b/a and a/k/a DURANTE
AGENCY,

Defendant(s).

Case No. 2:23-CV-402 JCM (DJA)

ORDER

Presently before the court is defendant Christian Durante's motion to dismiss. (ECF No. 15). Plaintiff Helen Mojtehededi filed a response (ECF No.20), to which defendant replied (ECF No. 22).

I. Background

This action arises out of alleged employment discrimination. As alleged in the complaint, plaintiff is one of defendant's former employees. She met defendant in 2016 when she was approximately 14 years old. (ECF No. 12 at 5). Plaintiff was translating for her father, who was purchasing insurance from defendant. (*Id.*) Defendant hired plaintiff, then a high school student, for the summer as a full-time customer service representative. (*Id.* at 6). Plaintiff quit a few months later to focus on her schooling. (*Id.*)

October 2020, defendant rehired plaintiff, who was then 18 years old. (*Id.*) Beginning in November of 2020, plaintiff claims defendant engaged in a pattern of harassment that included things like entering her office and offering her alcohol, suggestively commenting on her clothing, making sexual innuendos, and "jokingly" asking if plaintiff would consider engaging in

1 prostitution. (*Id.* at 6–11). In addition to verbal harassment, plaintiff alleges at least two
 2 instances of physical harassment consisting of unwanted touching. (*Id.* at 8–9). According to
 3 plaintiff, defendant’s sexually charged actions, left her no option other than to resign. (*Id.* at 11–
 4 12).

5 Plaintiff later filed this suit in state court alleging seven causes of action under Title VII
 6 of the Civil Rights Act and various tort theories. (ECF No. 1-1). Defendant timely removed to
 7 this court. (ECF No. 1). Plaintiff later filed an amended complaint with this court (ECF No. 12),
 8 which defendant now seeks to dismiss (ECF No. 15).

9 **II. Legal Standard**

10 A court may dismiss a complaint for “failure to state a claim upon which relief can be
 11 granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short and plain
 12 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell*
 13 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed
 14 factual allegations, it demands “more than labels and conclusions” or a “formulaic recitation of
 15 the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation
 16 omitted).

17 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
 18 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
 19 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation
 20 omitted).

21 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
 22 when considering motions to dismiss. First, the court must accept as true all well-pled factual
 23 allegations in the complaint; however, legal conclusions are not entitled to the assumption of
 24 truth. *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by
 25 conclusory statements, do not suffice. *Id.* at 678.

26 Second, the court must consider whether the factual allegations in the complaint allege a
 27 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint
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1 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for
2 the alleged misconduct. *Id.* at 678.

3 Where the complaint does not permit the court to infer more than the mere possibility of
4 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.”
5 *Id.* (internal quotation marks omitted). When the allegations in a complaint have not crossed the
6 line from conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at
7 570.

8 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d
9 1202, 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

10 First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim
11 may not simply recite the elements of a cause of action, but must contain sufficient
12 allegations of underlying facts to give fair notice and to enable the opposing party to
13 defend itself effectively. Second, the factual allegations that are taken as true must
14 plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing
15 party to be subjected to the expense of discovery and continued litigation.

14 *Id.*

15 If the court grants a Rule 12(b)(6) motion to dismiss, it should grant leave to amend
16 unless the deficiencies cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957
17 F.2d 655, 658 (9th Cir. 1992). Under Rule 15(a), the court should “freely” give leave to amend
18 “when justice so requires,” and absent “undue delay, bad faith, or dilatory motive on the part of
19 the movant, repeated failure to cure deficiencies by amendments . . . undue prejudice to the
20 opposing party . . . futility of the amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).
21 The court should grant leave to amend “even if no request to amend the pleading was made.”
22 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks
23 omitted).

24 **III. Discussion**

25 **A. Administrative issues**

26 Defendant moves to dismiss plaintiff’s first and second causes of action for two reasons.
27 First, defendant avers plaintiff had not exhausted administrative remedies because she had not
28 received a right-to-sue letter from the EEOC at the time she filed the complaint. (ECF No. 15 at
5–6). According to defendant, plaintiff was barred from filing in this court unless the EEOC

1 issued her a right-to-sue letter. (*Id.*) During the pendency of this motion, the EEOC issued
2 plaintiff that letter, mooted this argument. (ECF No. 22 at 2).

3 Second, defendant maintains he is not an “employer” as defined by Title VII, therefore
4 making the right-to-sue an inappropriate letter. (ECF No. 15 at 6). Title VII defines employer as
5 “a person engaged in an industry affecting commerce who has fifteen or more employees for
6 each working day in each of twenty or more calendar weeks in the current or preceding calendar
7 year.” 42 U.S.C. § 2000e(b). Defendant provided documentation purporting to show he
8 employed less than the required number of employees required by Title VII. (ECF No. 15 at Ex.
9 B). Plaintiff’s complaint, on the other hand, alleges that (1) defendant’s website lists more than
10 the requisite number of employees, and (2) government PPP loan websites indicate his business
11 had at least 15 employees. (ECF No. 12 at ¶¶ 13-15).

12 There appears to be a genuine issue of fact as to the number of individuals defendant
13 employs. Plaintiff correctly states the motion to dismiss phase is not the proper juncture to
14 weigh the credibility of well-plead allegations. For this reason, the court declines to dismiss the
15 first and second causes of action insofar as they are brought under Title VII or the Nevada state
16 law equivalent.

17 However, plaintiff also proports to bring her first and second cause of action under the
18 authority of 13 C.F.R. §§ 112–113, *et seq.* Section 112’s purpose is to effectuate the provisions
19 of Title VII relating to race, color, or national origin on businesses that receive financial
20 assistance from the Small Business Administration. *See* 13 C.F.R. § 112. Section 113 prohibits
21 recipients of financial assistance from the Small Business Administration from discriminating
22 based on race, color, religion, sex, marital status, handicap or national origin. *See* 13 C.F.R.
23 § 113. Neither 13 C.F.R. § 112 nor § 113 provide a private cause of action.

24 Instead, any person who believes they have been discriminated against in a prohibited
25 way may file a complaint with the Small Business Administration, which then investigates the
26 allegation. 13 C.F.R. § 112.10(b)–(c); 13 C.F.R. § 113.6(b)–(c). There is no allegation that
27 plaintiff has filed any such complaint, and, regardless, she has no authority to sue pursuant to
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1 these regulations even if she had. Therefore, plaintiff's first and second cause of action are
 2 dismissed insofar as they rely on 13 C.F.R. §§112–113, *et seq.*

3 *B. Tort claims*

4 Defendant next moves to dismiss plaintiff's third cause of action for negligent hiring,
 5 training, and supervision. (ECF No. 15 at 8-10). Defendant contends tort claims such as this are
 6 barred by the Nevada Industrial Insurance Act ("NIIA").

7 The NIIA provides exclusive remedies for injuries caused by negligence arising out of
 8 employment. Nev. Rev. Stat. 616A.020(1). Courts have regularly held that the NIIA
 9 specifically precludes claims of negligent hiring, training, and supervision. *See, e.g., Young v.*
 10 *Zappos.com, Inc.*, 2:08-cv-741 JCM (PAL), 2010 WL 1612140, at * 4–5 (D.Nev. Apr. 19, 2010)
 11 (citing *Wood v. Safeway*, 121 P.3d 1026 (Nev.2005)). Accordingly, the court finds that the NIIA
 12 bars plaintiff's negligent hiring allegation.

13 Defendant also moves to dismiss plaintiff's fourth and fifth causes of action for
 14 intentional infliction of emotional distress ("IIED") and negligent infliction of emotional distress
 15 (NIED), for the same reason—NIIA preemption. (ECF No. 15 at 9-10). However, these claims
 16 differ from the negligent hiring claim above.

17 In *Wood*, the Nevada Supreme Court stated sexual assault of an employee falls within the
 18 NIIA if the nature of the employment contributed to or otherwise increased the risk of assault.
 19 *Wood*, 121 P.3d. at 1034. However, the court also stated sexual assault is not within NIIA when
 20 "the animosity or dispute which culminates in the assault is imported into the place of
 21 employment from the injured employee's private or domestic life, ... at least where the animosity
 22 is not exacerbated by the employment." *Id.* (quotations omitted). Here, although plaintiff's
 23 injury occurred while at work, the personal relationship between plaintiff and defendant triggers
 24 the exception provided in *Wood*.

25 Plaintiff alleges, and defendant does not deny, that defendant made inappropriate
 26 comments and physical contact toward plaintiff. She claims that some of those comments
 27 referred to their relationship prior to the employer-employee relationship, thus importing dispute
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1 from their private lives into the place of employment. *See id.*; (ECF No. 12 at 6). Accordingly,
 2 plaintiff's IIED and NIED claims are not preempted by NIIA.

3 In the alternative, defendant contends plaintiff's injury is insufficient to sustain her IIED
 4 and NIED claims. Defendant posits severe emotional trauma, lowered self-esteem,
 5 sleeplessness, irritability, stress, depression, and humiliation are insufficient to give rise to an
 6 IIED charge. (ECF No. 15 at 13). Although these allegations may eventually fail on the merits,
 7 plaintiff's claims are sufficiently pled to survive a motion to dismiss. The same reasoning allows
 8 for NIED to stand as well.

9 Defendant also argues the alleged conduct was not extreme or outrageous. (ECF. No 15
 10 at 11). For conduct to be sufficient for IIED, it must "go beyond all possible bounds of decency,
 11 [be] atrocious and utterly intolerable." *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 911 (D.
 12 Nev. 1993). Given the alleged extent of their relationship—namely, that defendant has known
 13 plaintiff since she was a minor and nevertheless engaged in this behavior—it is plausible that
 14 defendant's conduct was extreme or outrageous, going beyond all possible bounds of decency.
 15 Accordingly, neither plaintiff's IIED nor NIED causes of action will be dismissed.

16 Defendant next moves to dismiss plaintiff's sixth cause of action for battery on the
 17 ground that it is past the statute of limitations. Plaintiff alleges the battery occurred in December
 18 of 2020, placing the event outside of Nevada's two-year statute of limitations. (ECF No. 20 at
 19 11); *see* Nev. Rev. Stat. 11.190(4)(c).

20 Plaintiff alleges in her response defendant became physical in December of 2020, but the
 21 physical contact continued after that date, and the claim should therefore not be dismissed. (ECF
 22 No. 20 at 11). That may be true, but there are no specific allegations in the complaint to support
 23 this claim. Cause of action six is thus dismissed without prejudice.

24 C. *Respondeat superior*

25 Defendant also moves to dismiss plaintiff's seventh cause of action for respondeat
 26 superior on the grounds that is not a separate cause of action. (ECF No. 15 at 15). Plaintiff does
 27 not oppose the argument that respondeat superior is not a cause of action but rather a theory of
 28 liability. (ECF No. 20 at 11).

1 Defendant is correct. The doctrine of respondeat superior provides that employers are
2 vicariously liable for the actions of their employees within the scope of employment.
3 Respondeat superior is a theory of liability, not a cause of action. *See Mitschke v. Gosal*
4 *Trucking, LDS., et al.*, 2:14-cv-1099 JCM (VCF), 2014 WL 5307950, at *2-3 (D.Nev. Oct. 16,
5 2014); *Fernandez v. Penske Truck Leasing Co., L.P.*, 2:12-cv-295 JCM (GWF), 2012 WL
6 1832571, at *1 n.1 (D.Nev. May 18, 2012).

7 Therefore, plaintiff's seventh cause of action for respondeat superior will be dismissed.
8 This does not preclude plaintiff from arguing that the theory of respondeat superior applies to her
9 other claims.

10 **IV. Conclusion**

11 Accordingly,

12 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's motion to
13 dismiss (ECF No. 15) be, and the same hereby is, GRANTED in part. Plaintiff's third and
14 seventh cause of action are DISMISSED with prejudice, and her sixth cause of action is
15 DISMISSED without prejudice.

16 DATED June 9, 2023.

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18 UNITED STATES DISTRICT JUDGE
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